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In Pro per

STATE OF CALIFORNIA

Energy Resources Conservation And Development Commission

In the Matter of:	)	Docket No. 97-AFC-1
	)	
	)	**PETITION FOR**
The Application for Certification	)	**RECONSIDERATION OF**
For the High Desert Power Project [HDPP]	)	**THE DECISION TO CERTIFY**
	)	**HIGH DESERT POWER**
_____	)	**PROJECT**

Gary A. Ledford, an Intervenor in the High Desert Power Project (HDPP) proceedings, Hereby moves for Reconsideration of the COMMISSION DECISION (DECISION) because errors have been made by failing to adhere to enabling statutes and CEQA. The Water issues facing the Mojave River area are severe and critical. Those issues are before the California Supreme Court and its decision may well hinge on the ruling by the 4th Circuit Court of Appeals stating "Where the reason is the same, the rule should be same."[1]

The Motion is made on the following grounds:

1. As a matter of law the Decision is contrary to the Warren-Alquist Act requiring the Energy Commission certify “reliable” power plants.[2]

[1] Opinion of Fourth Circuit in re MWA v Barstow et .al. at Page 60. “Equity dictates that all persons in the same position be treated alike. (Civ. Code, § 3511 [“Where the reason is the same, the rule should be the same.”])”

[2] Public Resources Code (PRC) § 25005

2. As a matter of law, the Energy Commission cannot certify a power plant that does not conform and comply with **any** applicable federal, state, regional and local laws[3] (also termed "LORS") without either:
   a. Making findings that the Decision does comply with all applicable LORS; or
   b. Making findings of overriding considerations.[4]
      A. The Commission's HDDP Decision does not comply with the California Constitution Article X Section 2 requiring scarce water resources be put to their highest and most beneficial use.
      B. The Commission's HDPP Decision allowing the use of fresh inland water for power plant cooling violates State Water Resources Control Board Resolution 75-58's (SWRCBR) "preferred use" policies. The Resolution, in the words of the State Attorney General's office, "demonstrates a strong state policy against squandering precious fresh inland water for power plant cooling towers."[5]

   The Commission Decision has failed to make findings of overriding consideration to explain non-compliance with the State Constitution and SWRCBR 75-58.[6]
3. Lacking required studies, the Energy Commission Decision that there are no significant adverse environmental effects can not be supported and should be reconsidered. As a matter of law, the applicant has the burden of presenting evidence to support the findings and conclusions required for certification of the site and related facilities.[7] Decisions requiring changes, alterations and alternatives[8] cannot be

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[3] PRC § 2523(d)(1) and Title 20 of California Code of Regulations (CCR)§§s 1744, 1752(l), and 1755(b).

[4] PRC § 25525, Title 20 CCR § 1752(2)(l): Title 14 CCR **§** 15093.

[5] May 22, 2000, letter from Department of Justice Deputy Attorney General, Nicolas Stern to Mr. Pedri CRWQCB and Ms. McChesney SWRCB attached hereto as Exhibit "A".

[6] Title 20 CCR **§** 1755©(2)

[7] Title 20 CCR § 1748(e)

[8] Title 20 CCR **§** 1755(c)(1) and (c)(2)

properly evaluated when required studies are lacking. When adequate information is not provided, it is the applicant, not the public, who should bear the burden of delays caused by awaiting critical information.

4. New facts demonstrate that the Decision to Certify the HDPP should be reconsidered and the certification process stayed pending the Supreme Court decision, which will clarify and firmly establish water rights in the High Desert.
5. The evidentiary record upon which the Decision rests demonstrates that the Energy Commission, as the lead agency with exclusive authority to certify power plants, violated provisions of the Public Resources Code[9] and CEQA[10] by failing to respond to the specific public comments.[11]
6. The environmentally-preferred method for cooling is ignored in the HDPP Decision.

Each of these points is more fully discussed in the sections that follow.

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[9] PRC § 21090.5, subd. (d)(2)(iv), Environmental Protection Information Center v. Johnson ("EPIC") (1st Dist. 1985) 170 Cal.App. 3d at 611-612, 621-622, fn. 10, 623 [216 Cal.Rptr.401]; Gallegos California State Board of Forestry (1sty Dist. 1978) 76 Cal. App. 3d j945,952-955 [142 Cal. Rptr. 86]. As a certified regulatory program, the agency must respond in writing to all significant environmental points raised by the public during the administrative evaluation process. Failure to do so can be grounds for invalidating the underlying project approval.

[10] RT 05/03/2000 page(s) 78-70, Commissioner Moore: "I think Mr. Ledford is raising yet another point that goes to what we've always said, at least in public, and that is that the process that we use is the moral equivalent of CEQA. And, in fact, it's not. It's just not. And he's raising the point again – and you can say ours is better or worse. I'm not making that qualifier, but it's not CEQA. It's not. And so if the desirable outcome is to have a surrogate or proxy for CEQA, this isn't do it and he's making that point."

[11] RT 05/03/2000 page 79 Commissioner Laurie: "This Commission did acknowledge that our process would be better if our process did respond to comments. And by your action, by Commission's action, last month, our regulations will be modified so that we do respond to comments as if it were an EIR"

I.

THE DECISION VIOLATES WARREN ALQUIST ACT BY NOT FULLY ASSURING THE PROJECT WILL BE RELIABLE.

The Decision is contrary to the Warren-Alquist Act requiring the Energy Commission certify "reliable" power plants[12]and contrary to the stated purpose of deregulation.[13] The Decision does not point to any evidence of a reliable water supply; without a reliable water supply there is no reliable energy [14] supply.

The Energy Commission is mandated to prevent "delays and interruptions in the orderly provision of electrical energy, protection of environmental values, and conservation of energy resources[15]… to promote all feasible means of energy and water conservation and all feasible uses of alternative energy and water supply sources…criteria used in analysis of proposed actions shall include lifecycle cost evaluation, benefit to taxpayers, reduced fossil fuel or REDUCED WATER CONSUMPTION DEPENDING ON THE APPLICATION…"[16]

No one disputes that the Energy Commission was created to assure citizens a reliable supply of electricity. With the newly deregulated market, however, some assert that the Energy Commission is now to step back and allow the marketplace to determine reliability. Intervenor asserts this contention is erroneous and so does Senator Peace, author of the deregulation legislation. At the Public Utilities Roundtable, Peace "emphatically and repeatedly stated that the electric deregulation law was enacted for

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12 PRC § 25001

13 "The purpose of the act – not 80 or 90 percent – but the purpose was to improve California's system reliability..." Statement of Senator Steve Peace, author of deregulation legislation. California Journal March 2,000; "California energy Whose job is it, anyway? By Richard Nemec, page 37.

14 PRC **§** 25620 The Energy Commission is authorized to seek reliable energy to improve the quality of life for California citizens when furthering public interest energy research.

15 PRC § 25005

16 PRC § 25008

only one reason – reliability. Lower prices and more competition had nothing to do with it, he said."[17] The unregulated market is sure to determine a project's financial viability. Viability will be the outcome of applicant choices and marketplace responses to those choices. "Reliability" is quite different. If the Energy Commission allows the marketplace to determine reliability, there is no longer a need for the Energy Commission.

The record in HDPP is clear on "reliability." when Hearing Officer Valkosky, asked the Acting Manager of the MWA if it was a matter of **"take your chances,"** he was told, "yes" as illustrated in the following transcript excerpt:

> HEARING OFFICER VALKOSKY: "Okay, so again, just to relate it to this particular project, the City of Victorville, on behalf of the applicant, will be coming back every year, and **it's pretty much take your chances** depending on the availability of water?"
>
> Acting MWA Manager Mr. Cauoette: "That's correct"[18]

Since the project's guarantee of a water supply relies on several documents that are not in existence it would be difficult, in fact impossible, for the Energy Commission to assure this project as "reliable;" (there is neither a "will-serve letter," nor any other supporting contracts). To issue a certificate to a project without a reliable supple of water clearly violates the Warren Alquist mandate. Furthermore, it would be unlawful to rely on "proposed agreements" which in and of themselves would require CEQA compliance.

The Energy Commission should reconsider the HDPP Decision to require the adoption of conditions that assure a reliable supply of electricity.

II.

DECISIONS TO CERTIFY POWER PLANTS MUST DEMONSTRATE COMPLIANCE WITH ANY APPLICABLE STATE LAWS (LORS ISSUE)

There are at least two LORS (The California Constitution Article X Section 2 and the SWRCBR 75-58) with which the HDPP Decision is non-compliant.

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[17] California Journal ibid.

[18] Hearing Transcript October 7th 1999, page 336 lines 8 - 14

A. CALIFORNIA CONSTITUTION ARTICLE X, SECTION TWO

As a matter of law, the Commission's HDDP Decision does not comply with the California Constitution Article X Section 2 that requires California's scarce water resources be put to their highest and most beneficial use. Instead, the Decision allows the use of fresh inland water for power plant cooling which is not the highest and most beneficial use.

Article X of the California Constitution and the California Water Code Sections 13550,13552.6 and 13552.8 declare that the right to use water from a natural stream or watercourse is limited to such water as **shall be reasonably required for beneficial use**[19]**{emphasis added} and <u>does not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion.</u>**

"Waste" has been legally defined as using water for power plant cooling.[20] According to the Department of Justice "When clean, high-quality water is consumed by a disfavored use, such as cooling towers, this is nothing but reckless waste."[21] Furthermore, permits or licenses for the appropriation of water will contain a term which will subject the permit or license to the continuing authority of the State Board to prevent waste, unreasonable use,[22] unreasonable method of use or unreasonable method of diversion of said water[23].

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19 Exhibit 126 Beneficial uses for Ground Water and surface Waters Within the Mojave Watershed, introduced into evidence without objection October 8th 1999.

20 SWRCBR 75-58

21 May 22, 2000, letter from Department of Justice Deputy Attorney General, Nicolas Stern to Mr. Pedri CRWQCB and Ms. McChesney SWRCB attached hereto as Exhibit "A".

22 "Unreasonable use" has been defined in Section 303 of the federal Clean Water Act (P.L. 92-500 as amended) water quality standards as both the uses of the water involved and the water quality criteria applied to protect those uses. Under Porter-Cologne Water Quality Act (CA Water Code § 13000 et seq.) beneficial uses and water quality objectives to protect those beneficial uses are to be established for all waters of the state, both surface (including wetlands) and ground waters.[22]

23 California Administrative Code § 761, Article 17.2, Subchapter 2, Chapter 3, Title 23. Neither the Energy Commission nor the State Board have provided a condition in the HDPP Decision consistent with this requirement.

"Unreasonable method of use" has been legally defined in SWRCBR 75-58 as the use of fresh inland waters for evaporative cooling. By contrast, the use of fresh water for evaporative cooling for power plants is not identified as a beneficial use.[24]

When certifying a power plant that does not comply with the State Constitution, the Energy Commission is required to make findings.[25]/[26] Where there is non-compliance, the Energy Commission is to consult and meet with the governmental agency to attempt to correct or eliminate the non-compliance. If, after consultations and meetings, the non-compliance is not eliminated, the project cannot proceed without findings of overriding considerations.[27] There are no findings in the HDPP Decision.

B. STATE WATER RESOURCES CONTROL BOARD RESOLUTION 75-58

First, HDPP's evidentiary record contains evidence that SWRCBR 75-58[28] is an applicable LORS and applies to this case. Yet, in an obvious attempt to ignore this vital issue, Resolution 75-58 is mentioned only once in the Decision on page 223. There, the committee states it **"explored the applicability."**

> Mr. Ledford also argues that use of cooling water by the project is inconsistent with State Water Resources Control Board Policy 75-58. (Ex. 124.) We explored the applicability of this statewide Policy during the

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[24] Exhibit 126: The Lahontan Regional (Basin Plan). There are 22 identified potential uses for surface water, and six for ground water offered as definitions of "beneficial users." None include a definition for evaporative cooling for powerplants.

[25] PRC § 25523(d)(1) and Title 14 CCR **§** 15065. A lead agency shall find that a project may have a significant effect on the environment and hereby require an EIR to be prepared for the project where any of the following conditions occur) The project has the potential to achieve short-term environmental goals to the disadvantage of long-term environmental c) The project has possible environmental effects, which are individually limited but cumulatively considerable. As used in the subsection, "cumulatively considerable" "Cumulatively considerable" means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects as defined in Section 15130. d)The environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly.

[26] Title 14 CCR § 15091.

> (1) No public agency shall approve or carry out a project for which an EIR has been certified which identifies one or more significant environmental effects of the project unless the public agency makes one or more written findings for each of those significant effects, accompanied by a brief explanation of the rationale for each finding.

[27] PRC §§s 25523(d)(1), 25525

[28] Comments on PMPD: pg. 21,22 & 25, Exhibit 124, SWRCBR 75-58

> hearings. It suggests limitations, where feasible, upon the use of fresh inland waters for power plant cooling.

Second, SWRCBR 75-58, by plain reading, states it applies to planning power plants who consider the use of fresh inland water for cooling. The Resolution states:

> "The purpose of this policy is to provide consistent statewide water quality principles and guidance for adoption of discharge requirements, and implementation actions for power plants which depend upon inland waters for cooling. In addition, this policy should be particularly useful in guiding planning of new power generating facilities so **as to protect beneficial uses of the State's water resources and to keep the consumptive use of freshwater for powerplant cooling to that minimally essential for the welfare of the citizens of the State.**

Consistent with the SWRCBR's direction to be a "policy …useful in guiding planning of new power generating facilities SWRCBR 75-58 has been cited as LORS in three recent siting case Decisions. In certifying those projects, the Resolution was applied to analyze the use of Dry Cooling or the use of reclaimed water. For example, in the Delta Decision, SWRCB issues are addressed as follows:

> The principle policy of the SWRCB which addresses the specific siting of energy facilities is the Water Quality Control Policy on the Use and Disposal of Inland Waters Used for Power plant Cooling (adopted by SWRCB on June 19, 1976 by Resolution 75-58). This policy states that use of fresh inland waters should only be used for power plant cooling if other sources or other methods of cooling would be environmentally undesirable or economically unsound.[29]

In recent cases, the Energy Commission [30]/[31] recognized the importance of SWRCBR 75-58, and required compliance with the Resolution in these three cases. However, in the HDPP Decision, the Energy Commission adopted the least-favored water use thereby failing to comply with the Resolution's requirement for analysis of the reasons for failing to adopt one of the more favored water uses.

In a letter dated May 22, 2000, the Department of Justice agrees that Resolution 75-58 applies to power plant siting cases and states, "This resolution demonstrates a

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[29] Delta Decision - Appendix LORS - page 30

[30] Pittsburg Decision - page 181 [in text] and Footnote 51

[31] Ibid. - Appendix A LORS page 44

strong state policy against squandering precious fresh inland water for power plant cooling towers."

The Energy Commission should reconsider the HDPP Decision because the Decision does not comply with the Resolution's requirements to limit the use of fresh inland water for power plant cooling and protect fresh water for other beneficial uses.[32] Since the Decision fails to comply with SWRCBR 75-58, overriding considerations must be adopted, if they exist, to certify this project.

III.

THE DECISION'S FINDING OF NO SIGNIFICANT WATER IMPACTS CANNOT BE SUSTAINED WITHOUT REQUIRED STUDIES

From the start of the HDPP, the Energy Commission identified significant adverse water impacts. The project could not go forward without considering WATER. Thus, the DECISION recognizes there is a limited amount of Water in the High Desert and that there is no available water for new allocations. Basin planning conducted by the State Board has shown that there **is no available water for new allocations in the Mojave River Basin[33].**

Projected future water demands, when compared to existing developed water supplies, indicate that general fresh-water shortages will occur in many areas of the State prior to the year 2000.[34]

Energy Commission regulations clearly require "Final Decisions" that protect the environment.[35] Thus, assuming that the decision to use fresh water for cooling the power plant is under the authority of the Energy Commission, adverse impacts cannot be

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[32] The SWRCB is directed by Resolution 75-58 to use every reasonable effort to conserve energy supplies and reduce energy demands to minimize adverse effects on water supply and water quality and at the same time satisfy the State's energy requirements.

[33] SWRCB Decision 1619

[34] SWRCBR 75-58

[35] CCR Title 20 § 1755(c)(1)(2)

ignored. The "Final Decision" must reject a project unless "changes" or "alterations" mitigate or avoid significant environmental effects.

Similarly, assuming that the decision to allow the use of fresh water for cooling is under the authority of another state agency, the Energy Commission cannot issue a "Final Decision" until the changes or alterations can/should be adopted by such other agency. The SWRCB is directed to "insure compliance with various state and federal laws including protecting beneficial uses of state's water and keep the consumptive use of fresh water for powerplant cooling to that minimally essential for the welfare of the citizens of the state."[36]

In either case, a careful reading of the Decision shows that critical information, needed by policy makers to make informed changes or alterations, is lacking.

The applicant has the burden of presenting evidence sufficient to support the findings and conclusions required for certification of the site and related facilities.[37] In HDPP, the applicant did not provide any information, studies or evaluations on SWRCBR 75-58 (establishing preferred uses for clean inland water); Water Code § 237 (assessing the availability of water for cooling) or Water Code § 462 (studying a preferred alternative – use of reclaimed water.).

In the absence of applicant-provided information, the Commissioners must look to the Energy Commission staff to comply with SWRCBR's requirement for an "evaluation" when less-favored fresh inland water use is proposed as outlined in the resolution:

> "The use of inland waters for powerplant cooling needs to be carefully **evaluated to assure proper future allocation of inland waters considering all other beneficial uses**. The loss of inland waters through evaporation in powerplant cooling facilities may be considered an unreasonable use of inland waters when general shortages occur."[38]

The record shows the Energy Commission did no "evaluation"

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[36] SWRCBR 75-58

[37] CCR Title 20 § 1748(e)

[38] SWRCB 75-58 page 3, at paragraph 4

Mr. O'Hagan, the Energy Commission water expert testified he had not performed an evaluation[39], but that Mathew Layton had.[40]

Mathew Layton stated: "No. I did a qualitative assessment."[41]:

Another missing element is the required assessment of the availability of water for thermal electric powerplant cooling purposes needed to provide information to guide policy-makers:

> "…Either independently or in cooperation with any person or any county, state, federal, or other agency, including, but not limited to, the State Energy Resources Conservation and Development Commission, **shall conduct studies and investigations** on the need and availability of water for thermal electric powerplant cooling purposes, and shall report thereon to the Legislature from time to time…." California Water Code Section 237

Similarly Water Code Section 462 requires studies: "…**conduct studies and investigations on the availabilit**y and quality of waste water and uses of reclaimed waste water for beneficial purposes including, but not limited to … and cooling for thermal electric powerplants."

No studies have ever been conducted for HDPP relative to the need and availability or the use of reclaimed water. The best that the Decision can muster is that it was "explored."[42]

> Decisions on waste discharge requirements, water rights permits, water quality control plans, and other specific water quality control implementing actions by the State and Regional Boards shall be consistent with provisions of *SWRCBR 75-58.*

Is there an "evaluation of preferred uses" under SWRCBR 75-58? Does one exist? If so, it should be a part of the record of this case. If not, the record shows the

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39 RT 10/08/1999 pg. 142

40 RT 10/08/1999 pg. 161-162

41 Ibid.

42 Final Decision HDPP Page 223

required "Evaluation" was not performed. And the same is true for water availability and use of reclaimed water.

If the Energy Commission, as the lead agency, must look to the SWRCB to conduct the studies, then the process should be like air-quality. By that Intervenor contends the Energy Commission should reconsider and not approve the HDPP until such studies are complete. This is similar to the Energy Commission procedures for determining Air District Compliance. In other words, "adequate clean water" is just as important as "clean air." The CEC cannot certify until the SWRCB issues a report similar to the air district's Determination of Compliance.[43]

IV.
DECISION SHOULD BE STAYED BECAUSE THE SUPREME COURT HAS SET THE DATE FOR HEARING ARGUMENTS.

New facts demonstrate that the Decision to Certify the HDPP should be reconsidered and the certification process stayed pending the Supreme Court decision, which will establish and clarify water rights in the High Desert. On May 3, 2000, the date of the previous Energy Commission ruling on this question, the Supreme Court hearing date was not known.[44] Now, Oral Proceedings are scheduled for June 5th 2000. [45]

The pending California Supreme Court decision relating to the use of water in the critically and severely overdrafted water basins was so important that the SWRCB delayed making a decision on a companion project adjacent to the HDPP.

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[43] For example, the Warren-Alquist Energy Resources Conservation and Development Act (PRC § 25000 et seq.) makes the California Energy Commission the lead agency with respect to the siting of powerplants generating over 50 megawatts of electricity. As to such projects, a responsible agency required to take action first might prepare a staged EIR expecting the Energy Commission to prepare additional CEQA review pursuant to its certified regulatory program. (CEQA Guidelines, §§ 15167, subd. (c), 15251, subd. (k); see also PRC § 21080.5.)

[44] RT 05/03/2000 page(s) 36-37 "With respect to the second issue, staff does not encourage the Commission to wait until the Supreme Court makes a decision on the adjudication. That has been ongoing since this process began. There's no end to it, potentially, in sight. And even if there were to be a decision next week, we have no idea whether it would impact this project or not".

[45] *Exhibit "B" Supreme Court announcement re. Hearings, attached hereto.*

By the very nature of the water contract uncertainties,[46] the Energy Commission Decision is a document that cannot accurately assess the present environmental setting. As long as the water supply issue is uncertain and the non-existence of a water contract (will-serve-letter) is the status, any discussion of the environmental impacts of the plant will be speculation at best. The Energy Commission siting process would not adequately alert the public and responsible agencies to the consequences of the HDPP's proposed facility because of those uncertainties. It is therefore, even more critical that water rights are finally determined and equally enforced and/or applied.

New evidence that was not available at the prior hearing demonstrates that "the end is in sight." A short wait of not more than 90 days to final decision by the California Supreme Court is not unreasonable under the circumstances. It is therefore sensible for the Energy Commission to reconsider and stay this proceeding until the rest of the legal landscape becomes clearer and more stable.

V.
AS LEAD AGENCY, HDPP DECISION VIOLATES WARREN ALQUIST ACT and CEQA BY FAILING TO PROVIDE MEANINGFUL RESPONSE TO PUBLIC COMMENTS[47]

The evidentiary record upon which the Decision rests demonstrates procedural violations of the Public Resources Code[48] and CEQA [49] by failing to provide meaningful responses to the specific public comments.[50] Comments raised by Ledford and other members of the public - unanswered by the Energy Commission - are briefly outlined:

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46 The existing contract uncertainties (no will-serve-letter, no supporting contracts) have precluded a proper review of the existing environment under CEQA.

47 Documents from a certified regulatory program pursuant to PRC § 21080.5, CEQA Guidelines §§ 15250-15253 must still meet CEQA's central requirements including the need to analyze feasible alternatives and mitigation measures, to consider potential cumulative impacts and to allow for meaningful public review. (PRC § 21080.5, subd. (a); CEQA Guidelines § 15250).

48 PRC § 21080.5, subd. (d)(2)(iv), "EPIC", supra, 170 Cal.App. 3d at 611-612, 621=622, fn.10, 623 [216 Cal.Rptr. 502]; Gallegos v. California State Board of Forestry (1st Dist. 1978) 76 Cal. App. 3d 945, 952-955 [142 Cal.Rptr.86].

49 See footnote 9 page 3.

50 See footnote 10 page 3.

1. 100% Consumptive Use of Water violates SWRCBR 75-58 allowing the project to use imported water "…gives HDPP twice the amount of water at a reduced rate than other all other producers in the Basin and thus creates an inequity."[51]

2. Water Agency[s] intending to provide water to the project have not conducted a CEQA analysis.[52]/[53]

3. There is no Cumulative Impact Study of the project as required by CEQA.[54]

4. There is no Growth Inducement Study of the project as required by CEQA.[55]

5. The Pipelines, Wells and Treatment Facilities planned to serve this project are oversized for the purpose of providing water service to the redevelopment of George Air Force Base and have not been studied under CEQA.[56]/[57]

6. Article X, Section 2 of the California Constitution prohibits the unreasonable use of water.[58]

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[51] Ledford's "Brief on Reopened Hearings and Revised Comments", March 7, 2000, p. 20; see also 1/27/00 RT 24. Several public participants echo Mr. Ledford's concerns. (See, e.g., 1/27/00 RT 51-56; 2/18/00 RT 78, 90-92.)

[52] RT 10/7/99 page 313 Randy Hill for VVWD - " your process has to meet the CEQA requirement before we can issue a will serve letter"

[53] Ibid. page 338: Norm Caouette:" our Ordinance requires CEQA. . "

[54] Certified regulatory programs must undertake a meaningful assessment of a project's cumulative environmental impacts. Environmental Protection Center v. Johnson (1st Dist. 1985) 170 Cal.App.3d 604, 624-625 [216 Cal.Rptr. 502]

[55] Staff comments on RPMPD dated: 4/13/2000: "**The RPMPD Is Incorrect in Stating that All Impacts, Including Growth-Inducing Impacts Associated with the Importation of SWP Water, Have Been Analyzed in Pre-existing Environmental Documents".**

[56] CEC Staff Testimony February 11, 2000: " Staff agrees with Mr. Ledford that certain aspects of the Agreement could create growth inducing impacts. Staff notes that all of the project's water related facilities are oversized. The Agreement (section 15) allows for VVWD's use of HDPP facilities".

[57] MWA Opening Brief to the California Supreme Court

[58] Exhibit 122 Direct Testimony of Gary Ledford on Wet/Dry Cooling; page 17

VI.
THE ENVIRONMENTALLY PREFERRED METHOD OF COOLING IS IGNORED

The first merchant plant generating project approved under “deregulation,” the Energy Commission adopted the environmentally preferred method of cooling -"Dry Cooling". The findings from that case (97 AFC 2) are compelling and include:

a) Utilizing a 100% dry cooling design will reduce groundwater use by over 95% from the original proposal of 3,000 gallons per minute to a revised annual average of less than 140 gallons per minute.[59]

b) Using a dry cooling tower eliminates PM10 emissions associated with its operation, and is the best control technology available.[60]

c) Using dry cooling eliminates a vapor plume and. will mitigate visual impacts of the power plants to below levels of significance.[61]

d) “ . . .using a 100 percent dry cooling design which will reduce groundwater use to an annual average of 140 gallons per minute and will result in zero discharge of effluent from the facility. The cooling tower will be replaced by air-cooled condensers that will not emit a steam plume and will eliminate biological impacts associated with wastewater discharge and cooling tower drift. (Ex. 2, p. 439; 11/2/98 RT 123.) The Commission has required this dry cooling technology to be used.[62]

e) Use of dry cooling technology removed the need to dispose of cooling tower blowdown. . "[63]

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59 97-AFC 2, Sutter Decision - page 16

60 Ibid. page 46

61 Ibid. page 121

62 Ibid. page 136

63 Ibid. page 180

f) "Calpine attorney Chris Ellison pointed out that if, as a result of high temperatures, the dry cooling facility (or air cool condenser) becomes less efficient, that fact only impacts the facility's profit margin, not its ability to safely and adequately cool the project. (Id. RT 28.) **Moreover, the Commission is requiring dry cooling as a Condition of Certification.**[64]

g) Staff viewed this efficiency loss as a minor reduction which is reasonable in light of the accompanying reduction in environmental impacts as a result of switching to dry cooling. These reduced impacts occur in the areas of water supply, waste disposal, and visual resources.[65]

In each of the above areas Dry Cooling was demonstrated to be the environmentally preferred method of cooling, yet was literally ignored in the HDPP Decision. The HDPP record states: Dry cooling is a viable cooling technology for the High Desert Power Plant,[66] and that there is no evidence to indicate that it is not economical.[67] Unfortunately, although the SWRCBR suggests a financial analysis of dry cooling, there is no study in the HDPP record.[68]

SWRCBR 75-58 goal is "**to protect beneficial uses of the State's water resources and to keep the consumptive use of freshwater for powerplant cooling to that minimally essential for the welfare of the citizens of the State".** It is difficult to understand how the Energy Commission, a sister-agency also charged with protecting

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64 Ibid.

65 Ibid. page 269

66 Mr. Layton's testimony, when he was asked if "Dry Cooling" was technologically and economically feasible, he testified as follows: Yes.

67 Question Mr. Ledford: Has any evidence been submitted to you in this proceeding that would indicate to you that it is not economical?

Answer: No.

68 Question Mr. Ledford: "And in the State Water Resources Control Board Resolution 75-58, does it require a financial analysis of dry cooling or does it suggest a financial analysis of dry cooling, might be a better .. ."

Answer: I believe it suggests.

state resources, can allow certification without a determination that the consumptive use of freshwater for its powerplant cooling is that which is "minimally essential."

This Intervenor agrees with the SWRB and the Attorney General that "it is essential that **every reasonable effort** be made to conserve energy supplies and reduce energy demands **to minimize adverse effects on water supply** and water quality and at the same time satisfy the State's energy requirements." It is reasonable, and environmentally preferable, to use dry cooling in the High Desert, in a critically over-drafted water basin.

Therefore Dry Cooling should be mandated in HDPP.

VI.
CONCLUSION

Intervenor has raised substantial issues of law that demonstrate the CEC has failed to follow the Warren Alquist Act and governing regulations.. Intervenor requests that the Commission hear this Motion and render a decision supported by findings of fact and conclusions of law; that

1. As a matter of law, the Energy Commission cannot certify any power plant, and in this case HDPP, that does not conform and comply with **any** applicable federal, state, regional and local laws[69] (also termed "LORS") without:
    a. Making Findings that the Decision does comply with all LORS; or
    b. Making a finding of overriding considerations. The Commission's HDPP Decision does not comply with LORS because the Decision allows the use of fresh inland water for power plant cooling thereby violating SWRCB Resolution 75-58.
    c. The Commission Decision has failed to make findings of overriding consideration and the HDPP should not be certified until it complies with all LORS.
2. As a matter of the Law the Commission's HDDP Decision does not comply with the California Constitution Article X Section 2 requiring the scarce water resources be

[69] PRC Section 2523(d) and Title 20 of CCR Section 1744

put to their highest and most beneficial use., therefore HDPP should not be certified using Evaporative Cooling.

3. As a matter of Law the Decision is contrary to the Warren-Alquist Act requiring the Energy Commission certify “reliable” power plants, therefore HDPP should not be certified unless Dry Cooling is mandated, or a fully reliable supply of water is fully established.
4. New facts demonstrate that the Decision to Certify the HDPP should be reconsidered and the certification process stayed pending the Supreme Court decision, which will establish and clarify water rights in the High Desert.
5. The evidentiary record upon which the Decision rests demonstrates procedural violations of the Warren Alquist Act and CEQA for failing to respond to the specific public comments or provide meaningful mitigation measures. The Public participation in the process is not meaningful if the CEC ignores the Public's input and fails to provide comments as required by it's own regulations.
6. The environmentally preferred method for cooling is ignored in the HDPP Decision, therefore HDPP should not be certified.

Respectfully submitted:
June 2, 2000

_____
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STATE OF CALIFORNIA

Energy Resources Conservation
And Development Commission

In the Matter of:	)	Docket No. 97-AFC-1
	)	
	)	
The Application for Certification	)	PROOF OF SERVICE
For the High Desert Power Project [HDPP]	)	
_____	)	

I _____ declare that on _____, I deposited copies of the attached **Motion for Reconsideration**, in the United States mail in Apple Valley California with first class postage thereon fully prepaid and addressed to the following:

Signed original document plus 11 copies to the following address:

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In addition to the documents sent to the Commission Docket Unit, individual copies of all documents were sent to:

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I declare under penalty of perjury that the foregoing is a true and correct.

_____